FILE COPY.

No. 481.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

Office Supreme Cou
FILED
MAR 1 19
JAMES H. McKE

ADDISON JOHNSON, Agent and Warden of the State Prison of New York at Sing Sing, N. Y.,
Appellant,

vs.

CHARLES C. BROWNE.

BRIEF FOR THE APPELLEE.

TERENCE J. McMANUS,
W. M. K. OLCOTT,
Of Counsel for Appellee.

C. A. Chadsey, 227 William Street. New York.
Telephone, 1290 Beekman.
1907.

In the United States Supreme Court,

OCTOBER TERM, 1906.

No. 481.

ADDISON JOHNSON, Agent and Warden of the State Prison of New York at Sing Sing, N. Y.,
Appellant,

vs.

CHARLES C. BROWNE.

Brief for the Appellee.

The Appellee was indicted in the year 1903, by the Grand Jury for the Southern District of New York upon two charges:

I. Conspiracy to defraud the United States of duties upon imports.

II. Knowingly admitting the entry of goods, wares and merchandise upon the payment of less than the amount due thereon, in violation of Section 5444 of the Revised Statutes of the United States.

Upon the conspiracy charge, the appellee was duly tried and convicted on February 20th, 1904, in the Circuit Court of the United States for the Southern District of New York and sentenced to a term of imprisonment in Sing Sing prison (page 1 of Record).

Upon appeal, the conviction was affirmed and application for writ of certiorari to this Court was refused (page 8).

The appellee had been released on bail pending appeal, and when it was sought to execute the sentence, it was discovered that he had fled to Canada.

Thereupon extradition proceedings were instituted by the Government, demanding his surrender by the Canadian authorities upon the charge of conspiracy for which he had been so convicted.

The demand for the surrender upon that charge was refused on May 12th, 1906 (pages 1 and 8).

Immediately thereafter, a new demand was made, based upon the untried indictment for violation of Section 5444.

The Canadian Government honored this requisition, and on July 25th, 1906, the fugitive was surrendered to William Flynn, the duly appointed agent of the United States in that behalf (page 1).

While on his way from Canada to the City of New York, in custody of the Government agent, the fugitive was taken from the custody of said agent at Poughkeepsie, N. Y., by the Marshal for the Southern District of New York and lodged in Sing Sing prison under a commitment based upon the conspiracy conviction (pages 2 to 5).

Thereafter a writ of habeas corpus was issued out of the Circuit Court for the Southern District of New York, upon the petition of the said fugitive, alleging that his commitment to the custody of the appellant was in violation of law, was with-

out right, authority, or jurisdiction of any kind, and especially in violation of Article III and Article VII of the Treaty between the United States of America and Her Britannic Majesty, of July 12th, 1889.

The return to the writ shows that the fugitive was held and detained by virtue of the conviction upon the conspiracy charge (pages 5, 6 and 7).

Upon the hearing on the writ, it was contended on the part of the fugitive, that his detention was in violation of the treaty provisions; in violation of the rule laid down in the case of the United States against Rauscher, 119 U. S., 407; and in violation of Sections 5272 and 5275 of the Revised Statutes of the United States.

The Government's contention was, that under the true construction of the Rauscher case it was lawful to apprehend an escaped convict, even though at the time of apprehension he had been brought within the country solely by virtue of a demand in extradition wholly unconnected with the crime for which he had been convicted.

It was further contended by the Government that the right to seize convicts was especially secured by the terms of the supplemental extradition convention of 1889. Incidental to this latter contention, it was urged that the treaty of 1889, being subsequent to the enactment of Sections 5272 and 5275, abrogated those statutes, as well as avoided the effect of the doctrine laid down in the Rauscher case as based upon the right implied from the treaty of 1842 (pp. 8 and 9).

After argument the Court sustained the writ and discharged the fugitive from the custody of the appellant.

The effect of this discharge was to restore him to the custody of the agent named in the extradition

proceedings, from which custody he was subsequently discharged upon giving bail to answer the indictment on the charge upon which he had been extradited.

Mr. Justice Hough, in his opinion sustaining the writ, said, after a lengthy review of the authorities:

> "But these treaty provisions are primarily the obligations of the contracting governments each to the other. The do not purport to repeal or modify any law of the United States, and they are not inconsistent with the continued enforcement of Sections 5272 and 5275, Revised Statutes, which constitute a rule of conduct obligatory upon the officers of the United States whose conduct is here questioned.
>
> "It is, of course, true that a statute inconsistent with a treaty is repealed by implication. It is too clear for argument that there is no such implication in this instance.
>
> "I am therefore of the opinion that without interpreting the language of the convention, the government contention is untenable in the light of the above referred to sections of the Revised Statutes as still authoritatively interpreted in the case of Rauscher.
>
> "It is doubtless true that the insertion of the word "punished," in Article 3 of the convention would have rendered that instrument clearer, and the argument is not without force, that its omission is notable in view of its presence in many other extradition treaties negotiated with other nations at or about the same time. As, however, I regard the general doctrine laid down in the case of Rauscher, as based upon existing statutes of the United States, to be entirely conclusive of this matter, I need not pursue the consideration of the convention of 1889 further than to say that it appears to me very doubtful, in view of the provisions of article 7, that article 3 should be so

> construed as to permit either of the contracting parties to do so by indirection under that article what neither could do openly under article 7, and that I consider the insertion of the word "punished" in article 2 as no more than a recognition of the historical fact that political offences are frequently punished without trial."

From the order discharging the fugitive (page 13), the Government has appealed, alleging as assignments of error,

> "1. That the Circuit Court discharged petitioner herein from the custody of appellant on the ground that his detention was in violation of the treaty of extradition between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland concluded July 12th, 1889.
>
> 2. That the said Court did not remand the said petitioner to the custody of appellant to execute the sentence of the United States Circuit Court for the Southern District of New York pronounced on said petitioner on the 11th day of March, 1904" (p. 14).

That these assignments of error are wholly without merit, we will endeavor to establish.

POINT I.

The order appealed from was in complete accord with well settled principles of law, with treaty provisions and with the Statutes of the United States relating to the subject of extradition.

The decision of Mr. Justice Hough was in harmony with:

(A) The doctrine of the most eminent writers on the subject of international law;

(B) The treaty of 1842 with Great Britain, as supplemented by the treaty of 1889;

(C) The rule established by this Court in United States vs. Rauscher, 119 U. S., 407;

(D) The provisions of Sections 5272 and 5275 of the United States Revised Statutes;

(It also accorded with the settled practice of the State Department since the Rauscher decision).

A. The doctrine of writers on international law.

Almost all of the important authorities on the law of nations have held that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial.

Foelix, Droit. Int. Prive, II Sec. 608; Twiss, Law of Nations, Time of peace, ed. 1884, Sec. 238; Phillimore, 3rd ed., I. 517; Creasy, Int. Law, 202; Lewis, For. Juris. 37; Pomeroy, Int. Law, Woolsey's ed (1886), 236; Lawrence's Wheaton (1863), 233.

"The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place."

Mr. Rush, Sec. of State to Mr. Hyde de Neuville, Apr. 9, 1817, M.S. notes to For. Leg. II., 218.

And also see:

Mr. Webster, Sec. of States to Mr. d'Argaiz, June 21, 1842. Webster's Works VI., 399-405.

This Court, in United States vs. Rauscher *supra*, so states the rule to have been saying:

"Prior to these treaties and apart from them, it may be stated as the general result from the writers upon international law, that there was no well defined obligation on one country to deliver up such fugitives to another, * * * and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."

Hence, the right to surrender rests, as between two sovereign governments, exclusively upon treaty provisions.

When treaty stipulations have been entered into,

the same writers and many others of equal authority hold that when a fugitive has been surrendered to the demanding government, he shall be tried only for the specific offense for which his surrender was granted, and that in the event of his not being tried for that offense, or having been tried and acquitted thereon, he is entitled to a reasonable time to leave the country before being arrested upon any other charge of crime alleged to have been committed prior to his extradition.

> 1 Moore on Extradition, p. 255; Billot. Traite de l'Extradition, 308; Field's Int. Code, §237; Wharton Conf. of Laws, §846.

In the United States this doctrine has now acquired the dignity of well settled law, this Court having held that

> "Upon a review of these decisions of the Federal and State Courts, to which may be added the opinions of the distinguished writers which we have cited * * * we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the Court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in the treaty and for the offense with which he is charged in the proceedings for his extradition until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."
>
> U. S. v. Rauscher, *supra.*

And see

Cosgrave vs. Whinney, 174 U. S., 63; Ex. P.

Ex. P. Coy, 32 F. R., 911; Peo. vs. Stout, 81 Hun, 336.

The exemption has also been held to extend to arrest in civil cases.

In re Reinitz, 39 Fed. Rep., 204.

(B) THE TREATIES WITH GREAT BRITAIN.

(1) *The Treaty of 1842*

was entitled

"A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade and for the Giving up of Criminals, Fugitives from Justice in Certain Cases."

With relation to the subject of extradition it provided:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requitions, by them or their ministers officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be

> found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

It was wholly barren of any provision limiting the right of trial to the offense for which extradition was granted.

Notwithstanding this omission, this Court said, in construing the treaty in the Rauscher case:

> "It is therefore very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it had not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject."

As to the view that

> "No matter by what contrivance or fraud or by what pretense of establishing a charge

provided for by the extradition treaty, he may have been brought within the jurisdiction, he is when here liable to be tried for any other offense," the Court said:

"This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted,, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, 'and for the giving up of criminals, fugitives from justice, *in certain cases.*' The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated; and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the Court or magistrate before whom this examination takes place that he is guilty, and such as the law of the State of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense and for no other."

(2) *The Treaty of 1889*

is entitled:

"Extradition Convention Between the United States and Her Britannic Majesty, *Supplementary* to the Tenth Article of the Treaty, Concluded Between the Same High Contracting Parties on the Ninth Day of August, 1842."

The provisions of the treaty which are pertinent to the question under discussion are as follows:

"WHEREAS, by the Tenth Article of the Treaty concluded between the United States of America and Her Britannic Majesty on the ninth day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

"AND WHEREAS, it is now desired by the high contracting parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention."

* * * * * * * * * * * * * *

"ARTICLE II. A fugitive criminal shall not be surrendered if the offense in respect of which his surrender be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

"No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

"If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

"ARTICLE III. NO PERSON SURRENDERED BY OR TO EITHER OF THE HIGH CONTRACTING PARTIES SHALL BE TRIABLE OR TRIED FOR ANY CRIME OR OFFENSE, COMMITTED PRIOR TO HIS EXTRADITION, OTHER THAN THE OFFENSE FOR WHICH HE WAS SURRENDERED, UNTIL HE SHALL HAVE HAD AN OPPORTUNITY OF RETURNING TO THE COUNTRY FROM WHICH HE WAS SURRENDERED.

* * * * * * * * * * * * * *

"ARTICLE VI. THE EXTRADITION OF FUGITIVES UNDER THE PROVISIONS OF THIS CONVENTION AND OF THE SAID TENTH ARTICLE SHALL BE CARRIED OUT IN THE UNITED STATES AND IN HER MAJESTY'S DOMINIONS, RESPECTIVELY, IN CONFORMITY WITH THE LAWS REGULATING EXTRADITION FOR THE TIME BEING IN FORCE IN THE SURRENDERING STATE.

"ARTICLE VII. The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefore shall not have been executed.

"In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

Article VI of the treaty considered in conjunction with Article III is absolutely conclusive of the proposition that no change in the scope of the procedure regulating the apprehension or detention of fugitives was intended.

A consideration of this Article gives additional force to the conclusion of Mr. Justice Hough that:

"There is no authority of or within these United States having any right or power to seize, arrest, confine or detain any person extradited in pursuance of treaty provisions and for a specific offense, crime or cause whatsoever (committed or existing before his extradition) except for that specific offense, crime or cause by reason of which the extradition has been granted; and further, that this doctrine rests not only nor principally upon the civil rights or personal privileges of a fugitive criminal who has ben returned in ac-

> cordance with an increasingly civilized international law, but upon the highest grounds of national honor, imposing upon this government and upon all persons subject to its rule the obligation to deal with the human being entrusted to them by a friendly foreign power *only with respect of the matter by reason of which he was so entrusted.*" (Page 12 of Record).

C. THE RULE ESTABLISHED IN THE RAUSCHER CASE.

need not be especially adverted to here, except to say that the entire discussion will show that Judge Hough's decision is not alone in accord with that decision, but that fundamentally it rests in part upon the same foundation, to wit: the controlling authority of Sections 5272 and 5275 of the Revised Statutes of the United States.

D. SECTIONS 5272 AND 5275 OF THE UNITED STATES REVISED STATUTES.

While Section 5272 regulates the method of delivery of a fugitive upon the demand of a foreign government, it is nevertheless important as showing the view taken by Congress of the scope and purpose of surrender. It reads:

> "It shall be lawful for the Secretary of State under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized in the name of and on behalf of such foreign government *to be tried for the crime of which such person shall be accused*, and such person shall be delivered up accordingly."

For the protection and security of persons surrendered to this government Section 5275 says:

> "The President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for security against lawless violence until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States or of the Militia thereof, as may be necessary for the safe keeping and protection of the accused."

This Court says, construing these two Sections in the Rauscher case:

> "The obvious meaning of these two statutes which have a reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; *and that when brought into this country upon similar proceedings he shall not be arrested* or tried for any other offense than that with which he was charged in those proceedings until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties, such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings."

THE VIEWS AND PRACTICE OF THE DEPARTMENT OF STATE.

The decision is also in line with the views which have obtained in the Department of State since the Rauscher decision, and especially since the enactment of the Treaty of 1889. In other words, the State Department has, in respect at least to extradition procedure with Great Britain, held that:

> "In regard to other matters occurring previous to extradition he (the fugitive) was not to be regarded as being subject to the jurisdiction of the government which obtained his surrender until he should have had an opportunity to return to the jurisdiction of the surrendering government."
>
> Vol. 4, Moore's International Law Digest, page 315.

This contention was advanced by the Department of State in the case of Leda La Montagne, who had been extradited to Canada on a charge of arson, and detained in jail in Canada without trial on a commitment for contempt of Court for refusing subsequent to her extradition, to testify against her brother, who was afterwards convicted on a charge of murder. It was urged by the Department of State that her extradition was obtained for the purpose of using her as a witness, rather than prosecuting her on a charge of arson.

> "Should this be the case, it constituted, said the Department of State, an abuse of extradition process which it was not supposed that Her Majesty's governent would countenance. But there was, said the Department, another aspect of the case, namely, the bearing of the provision of the convention of July 12, 1889,

prohibiting trial for any other than the extradition offense. *The insertion of this stipulation was first entertained by the United States on the urgent demand of the British Government;* but, even before it was adopted, the Supreme Court of the United States, acquiescing in the contention of the British Government in the Winslaw case, decided in the case of Rauscher, in 1886, that a fugitive delivered up under a treaty for one offense could not be tried for another.

"The British Minister, in a note of June 27, 1891, stated that the prisoner was detained as alleged, but that it was the intention of the authorities to try her for the offense for which she was surrendered, and he pointed out that the offense for which she was sentenced was committed subsequently to her extradition.

"The Department of State, July 11, 1891, replied that, while this was true, the question at issue was whether in refusing to answer the question put to her Leda La Montagne did not stand under the protection of the treaties; *that the stipulation in the convention of 1889 against trial for another offense was understood to signify that the fugitive was delivered up for the sole purpose of being tried for the offense for which the extradition was granted, and that in regard to other matters occurring previously to extradition he was not to be regarded as being subject to the jurisdiction of the government which obtained his surrender till he should have had an opportunity to return to the jurisdiction of the surrendering government.* On this principle the Courts of the United States had lately, said the Department, refused to permit an extradited person to be served with process or be detained in civil proceedings."

Vol. IV, Moore's Int. Law Digest, p. 314.

The same view is reiterated in a letter from Mr. Uhl, Acting Secretary of State, to Mr. Hanford,

April 21, 1894, 196 M. S. Dom. Let. 443, Vol. IV, Moore's Int. Law Digest, page 316, where he says:

> "I have received your letter of the 18th instant in further reference to the case of Charles Young, who was recently extradited from England.
>
> "In reply I have to say that, since the decisions of the Supreme Court in the Rauscher case, *it is believed by the Department to be well settled that a fugitive secured by extradition can neither be lawfully tried nor punished except for the offense for which his extradition was granted.* And this rule holds good notwithstanding the offense for which it was proposed to try or convict him be included in that for which his extradition was granted, unless the former is also included in the treaty, which is not the case here.
>
> "It is proper to say that this is also the view taken by the British Government."

Upon a review of these various sources of opinion and authority, it is confidently asserted that no other decision than that which Judge Hough rendered, could have been rendered upon the facts and under the law.

POINT II.

Neither the British "Extradition Act of 1870" nor Section 5275 of the United States Revised Statutes has been revoked, abrogated or even modified, by the treaty of July 12, 1889. Section VI of that Treaty is manifestly an unequivocal ratification of the controlling authority of the existing statutory procedure regulating extradition in both countries.

The appellant urges that in discharging the petitioner upon the ground "that his detention was in violation of the treaty of extradition between the United States of America and Her Majesty, Queen of the United Kingdom of Great Britain and Ireland, concluded July 12, 1889," error was committed. (Page 14 of Record.)

His contention must necessarily be based upon the assumption that the treaty of 1889 repealed, abrogated or modified, either expressly or by implication, some provision of the prior treaty of 1842, or the provision of Sections 5272 and 5275 of the Revised Statutes, or the British Extradition Act then in force, to wit: the act of 1870.

The language employed in Article VI of the treaty, however, is so clear, perspicuous and direct as to leave absolutely no room whatever for such contention. It says:

"The extradition of fugitives under the pro-

> vision of this convention and of the Tenth Article shall be carried out in the United States and in Her Majesty,' dominions, respectively, *in conformity with the laws regulating extradition for the time being in force in the surrendering country.*"

These words are plain and unambiguous as the English language can make them. A literal interpretation of them is all that is required in order to show the absolute unsoundness of the appellant's contention.

Now, what law regulating extradition (was) for the time being (July 25, 1906, the date of surrender) in force in the surrendering state? (Great Britian in this instance).

The "British Extradition Act of 1870" was, at the time the treaty of 1889 was executed, also at the time the surrender was effected, and is now as far as counsel has been able to ascertain, the law regulating extradition in force in Great Britian.

It provides, in subdivision 2 of Article III, that

> *"A fugitive shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be* **detained,** *or* tried in that foreign state for any offense committed prior to his surrender than the extradition crime proved by the facts on which the surrender is grounded."

This statute, being in force at the time of surrender, is to be given the same effect as if it had been set out *in haec verba* in the treaty.

See U. S. vs. Texas, 162 U. S., 1, 37.

Coupling the treaty and the statute, we find the intention of the parties to have been just that

which the respondent contends for, namely, that, when a fugitive was surrendered, the demanding government only acquired jurisdiction for the sole purpose of trying him for the offence for which his surrender had been granted and that as to all other matters occurring previous to extradition, he was not to be regarded as subject to jurisdiction of the demanding government until after his failure to return to the asylum country within a reasonable time after the disposition of the extradition charge.

The same conclusion would follow, if the situation were reversed. In other words, if Great Britain were the demanding State, and the United States the surrendering State, Great Britain would have, under the stipulation of Article VI, to observe the requirements of Sections 5272 and 5275, as interpreted in the Rauscher case and dispose of the extradition charge before any other action could be taken; and even then no other action could be taken until after the failure of the fugitive to take advantage of a reasonable opportunity to return to the asylum state.

The status of the fugitive, whether convict, debtor or any other, was inconsequential. He could not be DETAINED for any other purpose than that for which he had been surrendered. The contention, therefore, that the treaty of 1889 does anything except expressly ratify Section 5275, as well as the British Extradition Act, does violence to the language employed and is, in a word, *reductio ad absurdum*.

POINT III.

The implied repeal of a Federal statute by a subsequent treaty provision is not to be favored.

The rule that a repeal of a statute by implication is not to be favored, is even more rigid when it is sought to make a subsequent treaty provision the basis for such a construction.

Even where the language is explicit and express as to the repeal of a statute by a treaty provision, this Court has manifested reluctance about giving to a treaty the effect of a repeal.

> See Ware vs. Hillton, 3 Dall., 199;
> Haeunstein vs. Lynham, 100 U. S., 483.

This Court has also held that

> "A statute enacted by Congress expresses the will of the people in the most solemn form. If not repugnant to the Constitution it is by that instrument the supreme law of the land, and should never be held to be displaced by a treaty subsequently concluded unless it is impossible for both to stand together and be enforced."
>
> U. S. vs. Lee Yen Tai., 185 U. S., 213, 222.

> "When the two (treaty and statute) relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."
>
> Whitney vs. Robertson, 124 U. S., 191-94.

Assuming for the moment that the treaty of 1889 had never been concluded, it is clear that the arrest and detention of Browne would have been illegal under § §5272 and 5275 as interpreted in the Rauscher case.

But appellee has shown, we think conclusively, that Article VI of the treaty is a ratification of those statutes as well as of the doctrine enunciated in construing them.

Therefore, to sustain its contention, the government must look elsewhere in the treaty to find some clause which evidences an intention to limit the effect of Article VI as well as to repeal or modify the statutes and decision which otherwise would be controlling.

It claims to have found such intention in Articles II and III of the treaty of 1889; and absolutely ignoring the express requirements of Article VI, advances a contention which is wholly untenable, *i. e.*, that the logical deduction to be drawn from the omission of the word "punished," in Article III, following its inclusion in Article II, is, that the rights which we are bound to accord to persons accused, are to be denied to persons convicted of other offenses, committed prior to surrender.

Ignoring, for the moment, the existence of Article VI, and considering the provisions of Articles II and III, we deny that the premises justify the conclusion, for the following reasons.

The Constitution says that a treaty is a "supreme law of the land."

Therefore, in construing it, we have, (in addition to the right to refer to the preliminary treaty negotiations), the right to look to, not only "all parts of the act (treaty) itself * * * but

also to the condition and history of the law as previously existing and in the light of which the new act (treaty) must be read and interpreted."

U. S. vs. Wong Kim Ark, 169 U. S., 649.

Construing Article III in the light of preliminary diplomatic negotiations and pre-existing law, it is manifest that instead of modifying or repealing the earlier enactments and doctrine, Article III was intentionally declaratory of them.

The Article in question is precisely assertive of the position which Great Britain has consistently maintained since February, 1876, when the discussion in the celebrated Winslow case (referred to in the Rauscher decision) arose.

In the Winslow case the surrender of the fugitive was demanded in February, 1876, by this government from Great Britain, upon charges of forgery. Extensive diplomatic negotiation was had between the two countries, involving the giving or refusal to give a preliminary pledge from our government that it would not try the fugitive for any other offense than that for which he was extradited. Mr. Fish, Secretary of State, refused to give such pledge, and refused to accede to the doctrine that a person extradited could only be tried for the commission of the offense for which extradition was granted. The negotiations between the two countries were inconclusive in that Winslow was not delivered.

Following this, however, the Rauscher case was decided on December 6, 1886. It is reasonable to assume that Article III of the treaty was a ratification of the views which following that decision were accepted by both governments as to the scope and purpose of a surrender in extradition proceedings.

We find further confirmation of the consistency of the British position as well as the intention to make the treaty stipulation declaratory of existing law, in the attitude of the State Department, in the case of Leda La Montagne, where on July 11th, 1891, in a letter from Mr. Wharton, Acting Secretary of State, to Sir J. Pauncefote, British Minister (Vol. IV, Moore's Int. Dig., p 315) it was maintained that the stipulation in Article III was understood to signify that in regard to other matters occurring previously to extradition he (the fugitive) was *not to be regarded as being subject to the jurisdiction of the government which obtained his surrender till he* should have had an opportunity to return to the jurisdiction of the surrendering government.

And see

Letter of Mr. Adee, Acting Secretary of State, to Sir J. Pauncefote, May 19th, 1891 (M. S. Notes to Gt. Britain XXI, 49, IV Moore's Int. Dig., p. 314), where it was stated that this stipulation (Art. III) was inserted "on the urgent demand of the British government."

It is therefore clear that the omission of the word "punished" was not had for the reasons asserted by the government.

It is further asserted that its omission, in view of the surrounding circumstances, had no significance whatever except such as Judge Hough gives to its inclusion in Article II, i. e., that it was no more than a recognition of the historical fact that "political offenses are frequently punished without trial" (p. 12).

The appellant therefore most earnestly contends that only by doing violence to well settled rules of construction, as well as ignoring the historical

facts surrounding the making of the compact, and the diplomatic negotiations that led up to it, can the contention advocated by the government be maintained by this Court.

IV.

In answer to the Government's argument.

A.

The respondent notes with astonishment that in its brief to be submitted on the argument of this appeal, the government absolutely ignores the existence of Article VI of the Treaty of 1889, notwithstanding the controlling importance of that provision.

It well says, however, citing the authority of U. S. v. Texas, 162 U. S., 137, that the intention of the parties is to be gathered from an examination of the entire instrument.

Therefore, Article VI relating as it does, directly to the subject in hand, the failure to consider this all important provision, or even to revert to it, is all the more extraordinary and unaccountable. It could not have been overlooked. It must have been ignored advisedly. That this is probably the correct view of the Government's action, or rather lack of it, is easily demonstrated by applying the doctrine of U. S. v. Texas, as above enunciated, to the questions discussed herein.

By applying that doctrine we find that:

The Treaty of 1889 was not an original compact.

It was expressly declared to be "Supplementary to the Tenth Article of the Treaty" of 1842.

Therefore, under all the rules of construction, it is to be considered in conjunction with that Treaty, and with the cases in which the meaning of its terms was judicially determined.

Considering all together, the treaties, the decisions of this Court, the Statutes which regulate the procedure (and which under the treaty of 1889 have controlling force), they present a complete harmonious and consistent document. They manifest the intention of the parties clearly and without ambiguity.

There is neither occasion, nor justification for resorting to other treaties, with other countries to determine the exact, the literal intention of the parties, that intention manifestly being, to ratify the views as to scope and purpose of surrender as heretofore expressed by this Court, and expressed in the British Extradition Act above referred to

The appellant also urges the necessity of adhering to the plain meaning of the language of treaties.

Also that:

> "Treaties are the product of extended and careful negotiations."

To both of these expressions the respondent gives his heartiest assent.

With regard to the first, it is confidently asserted that by following this rule in the interpretation of the treaty in question, the contention he advances, must be adopted by this Court.

As to the second expression, the respondent has shown, to some extent, the course of these "extended and careful negotiations," which preceded the execution of the Treaty in question. They are proper subjects of investigation to arrive at the intention of the parties. Our investigation has shown that intention to be, as it is expressly declared, to wit, to effect surrender in accordance with existing law.

It is also urged by the appellant that if the language of the Treaty did not have the plain meaning attributed to it, it could have been amended during the negotiations between Mr. Hay and Lord Pauncefoote, terminating in the Treaty of 1902.

The appellant has apparently overlooked the fact that up to the present assertion of a contrary view, the view of the State Department had been completely in accord with that which Judge Hough adopted and which the respondent is here to advocate, to wit, that under the Treaty of 1889, the fugitive could not be *punished* for any other than the extradition offense.

(See Point I, Letter of Mr. Uhl.)

There was therefore no reason to change the language of the Treaty when both parties were of the same mind as to the meaning of the language employed.

B.

In merely seeking to determine the meaning of Article III by construing it in the light which the phraseology of Article II casts upon it, the government has violated the hard and fast rule of U. S. vs. Texas, *supra*, which it has invoked as being authoritative in determining the correct solution of the treaty questions involved in this case.

It is most respectfully insisted that Article III cannot be so construed without violating the rule of U. S. vs. Texas. It is contended that to ascertain the exact meaning and intention of the parties, it is necessary to consider the stipulations of Article VI and VII in conjunction with Article III.

Examining Article III from this view point, it is plain that the contention of the government is wholly without force.

The authority of Article III over the subject is by no means exclusive. Article VI is of equal importance in relation to the question of surrender.

We fail to see the relevancy of the governments, argument, based upon the assumption that if Great argument based upon the assumption that if Great Britain were to demand the surrender of the fugitive upon a charge of forgery or other extradition crime, could such person demand his discharge on habeas corpus by offering to prove that the real intent of Great Britain was to punish him for another non-political offense?

It is frankly admitted that discharge could not be demanded on such a ground. If such a demand were made the Court would undoubtedly say that the question was one over which another department of the government had control.

And, more than likely, if such a question arose

in any case where demand was made by Great Britain, the State Department could be relied on to protect the interests of the fugitive as it did in the case of Leda Lamontagne, to which respondent has more than once referred.

C.

The government urges at one place that the meaning of the treaty is so plain, unequivocal and unabiguous as to neither require nor permit the in order to ascertain the plain meaning of the terms employed?

Then, why expound as to the meaning of the obvious?

But above and beyond this, why resort to a rule of construction which in view of the language employed, is absolutely useless as a means of determining the question at hand.

The words of the treaty having a plain meaning, it is clear that if any rules are required to make that meaning even more obvious, "the same rules of construction and course of reasoning which we apply to the interpretation of private contracts" should be employed.

Tucker v. Alexandroff, 183 U. S., 424, 437.

These are the rules which Judge Hough employed in elucidating the question.

The terminology of other treaties throws absolutely no light on the question at issue.

The Treaty of 1889 speaks for itself.

D.

The Rauscher case has settled for all time, at least

until a statute or treaty amendatory thereof is passed or entered into, and declared the rule to be, that jurisdiction is acquired only for the take advantage of opportunity to leave, the jurisdiction, after that charge is disposed of. The government's analyses has not served to make reasonable, any other view of that decision.

Conclusions.

The respondent maintains that his arrest and incarceration was, as has been stated, in violation of settled law and treaty provisions. It is urged that his seizure was an employment of that "lawless violence" which Congress solemnly pledged itself to prevent.

The Court will not be unmindful of the fact that the honor of the United States is involved herein, It has ever been scrupulous to maintain the high standard of honor which a free and enlightened government, such as ours, should follow.

A question of merely public policy, is not of consequence where a breach of national honor is involved. The view of this question advocated by the appellant cannot be sustained without violating the compact which our government has solenmly pledged itself to obey.

It is respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

W. M. K. OLCOTT,
TERENCE J. McMANUS,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 481.

ADDISON JOHNSON, AGENT AND WARDEN OF THE STATE PRISON OF THE STATE OF NEW YORK AT SING SING, N. Y., APPELLANT,

vs.

CHARLES C. BROWNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Petition for writ of habeas corpus	1	1
Exhibit A—Judgment and sentence	5	3
Judgment on mandate	6	3
Affidavit of service of writ of habeas corpus	8	4
Writ of habeas corpus	9	4
Return to writ of habeas corpus	10	5
Judgment on mandate, etc	11	6
Opinion	15	8
Order discharging petitioner	25	13
Petition of appeal	27	13
Order allowing appeal	27	14
Assignment of errors	29	14
Citation (copy)	30	15
Clerk's certificate	32	15

12916—06 M——1